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No. March Term, 1878.

In the Court of Common Pleas No. 1.

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MANNERS

vs.

HENRY J. WILLIAMS AND THE LIBRARY COMPANY OF PHILADELPHIA.

***Sur* DEMURRER TO BILL.**

Brief on behalf of The Library Company of Philadelphia.

WM. HENRY RAWLE,
R. C. MCMURTRIE.

Allen, Lane & Scott's Printing House, No. 233 South Fifth Street, Philadelphia.

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Manners
vs.
Williams et al. } On Demurrer to Bill.

MEMORANDUM OF POINTS OF ARGUMENT FOR LIBRARY COMPANY, DEFENDANT.

"1. It appears by the complainant's own showing in his said bill that he, the said complainant, is not the sole heir at law of James Rush, the testator in the said bill named, but that there are other heirs at law of the said testator whom the complainant has not made parties to the said bill, nor has he stated any sufficient excuse for their non-joinder."

The prayer of the bill is "that the title of the residue may be declared to be in your orator, *according to his share* thereof under the intestate laws of Pennsylvania," and so throughout the prayers.

The plaintiff does not bring himself within any of the exceptions to the rule that all parties interested in or to be bound by the decree must be made parties. Even in the case of one legatee, it is settled that "If the parties are very numerous, one has been allowed to sue on behalf of all, although he could not have sued for his separate share without bringing the others before the court;" Adams on Equity, page 639.

Nor have the other heirs at law been made defendants, nor is excuse made for their omission.

"2. By virtue of the act of the General Assembly of this Commonwealth, approved the 26th day of April, A. D. 1855, the complainant, as an heir at law, has no interest in the estate of the said testator upon the grounds stated in the bill.

"3. If the provisions of the testator's will were invalid, as charged by the complainant, any proceedings by reason thereof must be instituted by leave of the Attorney-General of this Commonwealth according to the said statute in such case provided."

The object of the bill is to declare an intestacy as to the residue, because,

First.—Its disposition is so uncertain as to be incapable of clear meaning and impossible of execution;

Second.—Even if possible to be carried out, it is contrary to religion and morality.

If these were indeed so, the heir at law would, according to the common law, have a standing in court. But in Pennsylvania, the act of 26th April, 1855, section 10 (Purdon, 207), declares as follows:—

"No disposition of property hereafter made for any religious, *charitable*, *literary* or scientific use, shall fail for want of a trustee, or by *reason of the objects being indefinite, uncertain*, or ceasing or depending upon the discretion of a lost trustee, or being given in perpetuity or in excess of the annual value hereinbefore limited; but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, *so far as the same can be ascertained and carried into effect consistently with law or equity;* for which purpose the proceeding shall be instituted by *leave of the attorney-general of the Commonwealth*, on the relation of any institution, as-

sociation or individual desirous of carrying such disposition into effect, and willing to become responsible for the costs thereof, subject to an appeal as in other cases in said courts respectively, and to be reviewed, reversed, affirmed or modified by the Supreme Court of this State; but if the objects of the trust be not ascertainable, or have ceased to exist, or such disposition be in excess of the annual value permitted by law, or in perpetuity, such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the Legislature of this Commonwealth in manner as nearly in conformity with the intent of the donor or testator, and the rules of law against perpetuities, as practicable, or otherwise to accrue to the public treasury for the public use."

By the common law, the heir at law or the next of kin had their standing in court to contest such questions. By this statute they have none.

It is not arguable that this defendant does not come within the statute as a charity. Apart from the words of the Supreme Court as to it in Williams' Appeal, 23 P. F. Smith, 277—"A noble charity, at once a public benefit to his native city, Philadelphia, and a monument to those from whom he derived his wealth"—there is the recent decision as to it in Donohugh's Appeal, 35 Legal Int., 4 and 104, that it is "a purely public charity" within the meaning of the Constitution. And if not a charity (as the bill itself alleges, section XII.), it certainly is a *literary use.*

"4. Upon the complainant's own showing, the allegation of the want of funds wherewith to maintain the Library in

the said will mentioned is untrue in this, that by the very codicil relied on in the bill, the testator expressly dedicates for such purpose a fund of sufficient amount to secure certain annuities, whose aggregate is $10,400 per annum."

These annuities are omitted in the copy of the will annexed to the bill, and the words "private bequest" inserted; but of course the whole will is considered to be before the court, and the annuities are these:—

Anne Knee	$200	a year.
Mrs. Catherine Souder	200	"
Thomas Craven	600	"
Miss Little and Mrs. Spruill, and the survivor	1,800	"
Miss Ritchie	1,000	"
Benjamin Rush	300	"
Maria Rush	300	"
S. Catherine Rush	300	"
Richard H. Rush	300	"
Mrs. Clark	1,800	"
Robert Manners	900	"
Julia Manners	900	"
Mrs. Biddle	1,800	"
	$10,400	

Of these annuities, those to Benjamin Rush and Robert and Julia Manners were revoked by the last codicil, dated 12th April, 1869.

If the bill means to allege that the Library Company has no funds of its own, this should have been averred in the bill, and cannot now be assumed to sustain the point made, as it is essential to that point. Moreover, the testator himself (first codicil, clause IV.) expressly refers to the funds of the Library Company.

"5. The clauses of the said will alleged to be contrary to morality are merely directory, and do not compel the purchase or preservation of any book whatever; nor can it be assumed that it was the intention of the testator to preserve illegal publications, and the purchasing of none other can be held to be a violation of law."

The testator's suggestions, viz. (first codicil, clause V.):—
"I do not wish that any work should be excluded from the Library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency. Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error,"
are, at the utmost, directory.

Mr. Girard went further, and made it a "restriction and condition" of his bequest for his college that "no ecclesiastic, missionary or minister of any sect whatsoever" should ever be admitted within the college, even as a visitor. The objection that this restriction was hostile to the Christian religion, and therefore void, was thoroughly considered in Vidal *vs.* Girard's Executors, 2 Howard, 128, where it was held that the restriction contained "nothing inconsistent with the Christian religion, or opposed to any known policy of the State of Pennsylvania."

It was obviously held in Zeisweiss *vs.* James, 13 P. F. Smith, 465, that a devise to "the Infidel Society in Philadelphia," implied "an association of infidels or unbelievers for the purpose of propagating infidelity, or a denial of the doctrines and obligations of revealed religion, * * a hall dedicated in perpetuity for the free discussion of religion, politics, &c., under the direction and administration of a society of infidels," and, therefore, was not a charity. No strained construction can torture such a meaning out of this testator's language, and the plaintiff's

argument would prove too much, and exclude all controversial writings on the five named topics, viz.:—

Science,
Government,
Theology,
Morals and
Medicine,

although containing, to use the testator's own language, "temperate, sincere and intelligent inquiry and discussion."

In order that the plaintiff should sustain this part of his contention, he must show that the testator's directions to violate the law are so plain that nothing but such violation would be within the terms of the trust.

"6. If, as alleged in the bill, certain parts of the said testator's scheme for a library are impracticable or illegal, this will not defeat the scheme as a whole, but the same will be carried into effect in manner as nearly in conformity with the intent of the testator as practicable, according to the provisions of the said statute in such case provided."

This was definitely settled in The City *vs.* Girard's heirs' 9 Wright, 9, where it was said:—

"Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity. For equity will substitute another mode, so that the substituted intention shall not depend on the insufficiency of the normal intention * * and this is the doc-

trine of *cy pres,* so far as it has been expressly adopted by us. * * The meaning of the doctrine, as received by us, is that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close *approximation* to that scheme as reasonably practicable; and so, of course, it must be enforced."

And the rule was practically applied by this court in Heddleson's Estate, 8 Phil. Rep., 602.

"7. If, as alleged in the bill, the testator purchased the said lot of ground situate at the corner of Broad and Christian streets, within one calendar month prior to his death, yet this purchase was not such a conveyance in trust for charitable uses as is void by reason of the provisions of the said statute in that behalf provided."

The statement of the bill as to this is evasive.

It is thus:—

"That within one calendar month prior to his decease, the said Dr. James Rush purchased a lot of ground, situate on the south-east corner of Broad and Christian streets, in the city of Philadelphia, which said lot was purchased by him, and was subsequently conveyed for a charitable use, as set forth in the trusts and conditions contained in the aforesaid writings, alleged to be his last will and codicils."

It is not stated how the lot was so purchased and conveyed, and this want of precision is bad on special demurrer.

But apart from this, every line in the testator's will and codicils about the charity he designed to endow was written

years before his death—the greater part of it, nine years before. The purchase of the lot was a mere change of investment. But for the purchase, the money which bought the lot would have gone, as part of the residue, to the Library Company. Neither money nor lot was "bequeathed, devised or conveyed in trust for religious or charitable uses" within one month prior to the death.

In Schultz's Appeal, 30 P. F. Smith, 396, the testator devised his estate unconditionally to an individual with the very intent to evade the statute, and it was held that, the devisee not being a party to the fraud, the estate vested in him, and the case was not within the statute, though he designed to carry out the testator's verbal directions—"the bequest was not within the words of the statute."

The Supreme Court has, as to this very will, decided (Williams *vs.* Library Company, 23 P. F. Smith, 249) that the executor purchased the lot "in the exercise of his own deliberate judgment," the testator having himself designedly refused to run "the risk of making a new will, lest his death within thirty days afterwards might avoid it;" opinion of the Court, page 279.

"8. If the objects for which said purchase was made were or are void, the property would, under the said statute, become part of the testator's residuary estate, to the exclusion of the complainant."

That is to say, supposing the purchase of the lot were "a conveyance in trust for charitable uses" within the statute, yet the latter expressly declares that—

"All dispositions of property contrary hereto shall be void, and go to the *residuary legatee or devisee*, next of kin or heirs according to law."

Obviously, the next of kin or heirs cannot take if there be a residuary legatee. In his very last codicil, the testator speaks of "the motives which induced me to choose The Philadelphia Library Company as *the heir to my estate.*" Evidently, the last thing the testator wanted was that he should die intestate.

"9. The additional directions contained in the last codicil as to the management of the Library after acceptance, did not, as alleged in the bill, revoke the prior provisions of the will as to the disposition thereof in case of non-acceptance."

The "additional directions in the last codicil" were, first, an authority to expend all the estate, except a certain reserved fund, in the erection of the library and book-cases; and second, to publish editions of the testator's works.

It is difficult to see how either of these is a revocation of the will.

But the first clause of these "additional directions" is capable of a misconstruction which a few words can set right.

The clause is as follows :—

"I have given and devised the greater part of my estate to my executor for the purpose of erecting for the Library Company of Philadelphia a building not only large enough to contain their present books, but also their probable increase for many years to come. Now, as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate (not a competing) increase of the library and their current expenses (not to be so large as to invite extravagance and waste), for

which purposes the sums to be set apart to secure the legacies and annuities given by my said will and testament will be sufficient, I hereby authorize and direct my said executor to expend the whole remainder of my estate in the purchase of a lot and the erection of the Library building, construction of book-cases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution."

If, indeed, the testator thought only of that particular institution, "The Library Company of Philadelphia"—as to which he knew, first, that they already had a library, and second, that they had funds of their own—then the clause in question might possibly require a strict construction which would compel the sacrifice of the secondary intent in order that the primary intent might be supported.

But there is no necessity for this, for, secondly, the testator also viewed the contingency that the Library Company might *not* accept, and he guarded against this by providing for another and a separate institution, "The Ridgway Library," and the clause in question must be considered as applicable also to this contingency. Now he starts the clause by his express desire that the devisee *shall* have an income sufficient to provide for the legitimate increase of the library and current expenses, for such is the only construction of the words he uses :—

"Now as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate increase of the library and their current expenses."

The idea is repeated in the closing lines of the clause :—

"Leaving [that is to say, "so as so leave"] the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution."

This, which is perfect sense, is sought to be reduced to nonsense by a strict construction of the phrase which comes between, and which, it must be borne in mind, contains,

not words of devise, but mere words of expression of opinion, viz. :—

"For which purposes, the sums to be set apart to secure the legacies and annuities given by my said last will and testament will be sufficient."

Now, unless it is contended that the testator supposed that all the annuitants would die immediately (an absurdity which is out of the question), these words must be read in connection with those which precede and follow it, and the result is the following harmonious and sensible interpretation of the whole :—

I. I desire that the devisee shall have an income large enough to provide for the legitimate increase of the library and their current expenses, and no larger ;

II. My executor will doubtless set apart a sum sufficient to secure the annuities and provide for this legitimate increase and current expenses ;

III. I authorize and direct him to expend the whole remainder of my estate in the purchase of a lot and the erection of the library building, construction of book-cases, &c. ;

IV. So as to leave the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution.

So much for the natural meaning of the words.

Now upon the question of judicial construction—of legal interpretation—the law is clear. It is settled that a codicil is never to be taken as revoking a will, unless

1. It contain express words of revocation, or,

2. Its provisions are so repugnant to the will that the two cannot stand together.

Of these, only the second need be considered.

"Where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original to devise. The law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases;"

1 Williams on Executors, 185 (7th ed.), and notes.

An analogy may be found in the rules of construction of statutes. A statute and its supplement are taken as one statute, just as a will and its codicil are taken as one instrument. The provisions of both are, if possible, to be harmoniously construed, and a repeal by implication is invariably struggled against by the courts. For this, it would be superfluous to cite authority.

It remains only to observe that there are reasons why the English cases should favor the heir at law, which do not exist here. "They owe their origin," said Taney, Ch. J., in Bosley *vs.* Bosley, 14 Howard, 397, "to the principles of the feudal system, which always favored the heir at law, because it was its policy to perpetuate large estates in the same family. * * It has not been the disposition of courts of justice, in modern times, to extend the application of these rigid technical rules, but rather to carry out the intention of the testator, where no fixed rule of legal interpretation stands in the way. And this is, or ought to be, more especially the case in this country."

"10. The testator having, by his will, devised his whole estate in trust for the uses of a library, any subsequent direction to expend any part thereof in the purchase

and improvement of a lot for the same, did not operate as a revocation of the previous gift; nor could the failure or omission by the executor to expend the whole remainder of the estate in such purchase and improvement, being a matter over which the beneficiary had no control, divest the estate, or any part thereof, so as aforesaid devised."

The Supreme Court has decided that under this will the Library Company had, and has, no voice whatever, nor any standing in court, to restrain or affect any act of the executor as to their building (Williams' Appeal, 23 P. F. Smith), and hence that if he should *bona fide* locate it in any part of the city, however inconvenient or even ruinous, they could not be heard in opposition. Nor, of course, could they control him as to how much he should or should not spend on the building. This being so, the plaintiff's contention comes to this—that if the executor should by economy save a surplus after the building is finished, this act of saving forfeits the charity to the beneficiary, though the latter has had no say in the matter. It is difficult to answer such a proposition.

"11. If no disposition were made of the residuary estate not thus expended nor required for paying annuities, yet any such surplus is not vested in the complainant, but remains as a gift to charitable uses to be applied under the said statute in that behalf provided."

The case of the City *vs.* Girard's Heirs, 9 Wright, disposes of this contention. It was urged that Mr. Girard never contemplated that the college would absorb all the income, and that there being a large surplus, the latter went to the heirs, and the court below so decided; but this

was reversed on writ of error. And if it be said that that case was decided apart from the act of 1855, yet that statute is express as to the duty of the courts and the legislature, and provides the machinery necessary for the purpose. (See the statute, *supra*, page 2.)

"12. It is not alleged in the said bill that the time has yet arrived for this defendant to elect to accept or refuse the trusts in the said bill contained, and the averments therein as to the refusal, incapacity or failure of this defendant so to accept, are too uncertain and inconsistent to require answer thereto."

For aught that appears in the bill, there is nothing to show that the testator has done anything beyond prove the will—no averment that a single stone of the library building has been laid.

And as the will says: —

"And upon this further trust, as soon as the building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto the Library Company of Philadelphia aforesaid and their successors, for the uses and purposes of their library;" it is obvious that until the first trust, that of building, shall be completed, the second trust, that of conveying, cannot arise.

"13. It appears by the complainant's own showing that the person is still living whose discretion is alleged to be necessary to execute the trusts in the said bill contained.

"14. The trusts defined by the will are sufficiently certain to be carried into effect after the selection of the lot referred to, without requiring the personal direction of the executor, defendant herein, and moreover, in case of the death of the latter, certain other persons are, by the said will, nominated and appointed by the said testator to be executors in his place and stead."

The trust to select the site and build was the only one requiring personal discretion within a generation. And to secure this, the testator nominated two executors to succeed Mr. Williams after his death; (first codicil, clause XXVIII.) It is difficult to answer the contention that the estate goes to the heir at law, because Mr. Williams' "personal care, skill, taste, judgment and discretion," are alleged to be necessary to carry out, for all future generations, the testator's wishes as to the future management of the charity. To state such a proposition is to refute it.

Nor, apart from the act of 1855, is there any such trust as would fail for want of a trustee, for the same rule must then apply to a gift to an executor to purchase a dwelling for a testator's daughter.

"15. The complainant is debarred by his *laches* from controverting the provisions of the said will; and, by reason of lapse of time, no alleged invalidity of the codicils, or any part thereof, can now avoid the will."

The testator died on the 26th of May, 1869, and the will and codicils were proved on the 31st day of that month.

By the act of 22d April, 1856, section 7 (Purdon, 407), it is declared:—

"The probate by the register of the proper county of any will devising real estate, shall be conclusive as to such realty, unless within five years from the date of such probate those interested to controvert it shall, by *caveat* and action at law duly pursued, contest the validity of such will as to such realty."

By the common law, the admission of a will to probate was conclusive as to *personalty;* that is to say, as to the *factum* of the instrument. All such questions as whether it had been revoked—whether a particular clause was or was not part of the instrument—whether a codicil was intended as a republication or as a new will—are questions for the court of probate, and for it alone. Its decision, establishing the *factum,* closes such questions as to personalty against all the world; 1 Williams on Executors, 405, *et seq.*

It was otherwise as to *realty,* and to remedy the mischief arising from the leaving open of such questions indefinitely, our act of 1856 has put realty on the same footing as personalty.

Hence the testator's will, *qua* will, is conclusive both as to realty and personalty, so far as all such questions are concerned; and if the plaintiff should now produce a will leaving all the estate to him, he would have no standing in our courts. So, if he should contend, not merely that the codicil varies the will, but that it revokes it, so as to make it inoperative, he, equally, would have no standing. That question should have been litigated within the five years—after that time, nothing remains but questions of construction.

There being then, confessedly, a valid will by which the Library Company is the residuary devisee, if the codicil revokes at all, it revokes only by substitution—by variation—by change of the mode of enjoyment—and up to the

point where this fails to be shown, the original will stands undisturbed;

1 Jarman on Wills, 159;

Lemage *vs.* Goodban, Law Rep., 1 Prob. and Divorce, 57;

In *re* Goods of Petchell, 3 *id.*, 153;

1 Williams on Executors, 185;

And the question of construction has already been considered; *supra*, page 12.

"16. The complainant, while seeking equity, has not offered to do equity in this, namely, he has not offered to repay to the executor any moneys, part of the testator's estate, bequeathed for the use of this defendant, which the executor may have expended upon the lot of ground now claimed by the complainant."

It may be that the executor has spent, as he was directed to do, a great part of the estate in erecting a library building on the lot in question, and if so, confessedly without objection on the part of the plaintiff. If the latter should succeed in his claim for the lot, of course the building would pass with it, and the residuary devisee would lose just so much of the estate as it cost. It is so contrary to equity that the plaintiff should recover the lot, without making good this loss, that the question will hardly bear argument.

Wm. Henry Rawle,
R. C. McMurtrie,
For Library Company, Defendant.